FILED
MAR 2 2 2007
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SUPREME COURT, U.S.

(4)

No. 06-984

In the Supreme Court of the United States

JOSE ERNESTO MEDELLIN, PETITIONER

v.

STATE OF TEXAS

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

In the *Case Concerning Avena & Other Mexican Nationals (Mex.* v. *U.S.)*, 2004 I.C.J. 128 (Mar. 31) (*Avena*), the International Court of Justice decided that, to remedy violations of the Vienna Convention on Consular Relations, *done*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S., in the cases of 51 named Mexican nationals, including petitioner, the United States must provide review and reconsideration of their convictions and sentences through a judicial process to determine whether treaty violations caused actual prejudice, without regard to procedural default rules. On February 28, 2005, President George W. Bush determined that the United States would comply with its international obligation to give effect to the decision by giving those 51 Mexican nationals review and reconsideration in the state courts. The Texas Court of Criminal Appeals held that the President's determination exceeded his powers, and it refused to give effect to the President's determination or the *Avena* decision. The questions presented are:

1. Whether the President of the United States acted within his authority under the treaties, statutes, and Constitution of the United States when he determined that the United States will comply with its treaty obligations by having state courts give effect to the *Avena* decision in the cases of the 51 Mexican nationals addressed in the decision.

2. Whether, absent the President's determination, a private party could enforce the *Avena* decision in state court.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the questions whether the President validly determined that the United States will discharge its international obligations under the decision of the International Court of Justice (ICJ) in *Case Concerning Avena & Other Mexican Nationals* (*Mex.* v. *U.S.*), 2004 I.C.J. 128 (Mar. 31) (*Avena*), by having state courts give effect to the *Avena* decision, and whether, apart from the President's determination, the ICJ's decision would be privately enforceable in state courts. Because those questions involve the lawfulness of a Presidential determination and the effect of the decision below is to undermine his determination of how the United States will comply with its treaty obligations, the United States has a substantial interest in the resolution of those questions. The United States filed a brief in this Court addressing those issues in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam). It also filed a brief in the Texas Criminal Court of Appeals.

STATEMENT

1. In 1969, after the Senate provided its advice and consent, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), *done*, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. at 292-293, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36(1)(a) states that "consular officers shall be

free to communicate with nationals of the sending State and to have access to them." 21 U.S.T. at 101, 596 U.N.T.S. at 292.

Article 36 further states that "[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Art. 36(1)(b), 21 U.S.T. at 101, 596 U.N.T.S. at 292. In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." *Ibid.* State authorities "shall inform the person concerned without delay of his rights under [Article 36]." *Ibid.*

Article 36(1)(c) also states that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." 21 U.S.T. at 101, 596 U.N.T.S. at 292. It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." *Ibid.* At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." *Ibid.*

The rights referred to in Article 36(1), 21 U.S.T. at 100-101, 596 U.N.T.S. at 292, "shall be exercised in conformity with the laws and regulations of the receiving State." Art. 36(2), 21 U.S.T. at 101, 596 U.N.T.S. at 292-293. That requirement "is subject to the proviso, however, that the said laws and regulations must enable full

effect to be given to the purposes for which the rights accorded under this Article are intended." *Ibid.*

An Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), *done*, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487, which the United States ratified in 1969, Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488, and from which it withdrew on March 7, 2005, *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2675 (2006), provides that "[d]isputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." 21 U.S.T. at 326, 596 U.N.T.S. at 488. Any party to the Optional Protocol may bring such disputes before the ICJ. *Ibid.*

Article 94 of the Charter of the United Nations (U.N. Charter), 59 Stat. 1051, which is also a Treaty ratified by the United States, provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Article 59 of the Statute of the International Court of Justice (ICJ statute), 59 Stat. 1055, 1062, which is incorporated into the U.N. Charter, provides that the decision of the ICJ "has no binding force except between the parties and in respect of that particular case." Only nations may be parties to cases before the ICJ. Art. 34, 59 Stat. 1059.

2. Petitioner, a Mexican national, was convicted of participating in the gang rape and murder of two teenage girls and was sentenced to death. Pet. App. 2a. On direct review, the Texas Court of Criminal Appeals affirmed the conviction and sentence. *Ibid.*

Petitioner then filed a habeas action in state court, claiming for the first time that Texas's failure to inform him of his rights under the Vienna Convention required

reversal of his conviction and sentence. Pet. App. 2a. The state trial court rejected that claim on several grounds, including that petitioner had procedurally defaulted that claim by failing to raise it at trial. *Ibid.* The Texas Court of Criminal Appeals affirmed. *Id.* at 2a-3a.

3. Petitioner then sought federal habeas corpus relief, based on his Vienna Convention claim. Pet. App. 3a. The district court rejected that claim. *Ibid.* While petitioner's application for a certificate of appealability was pending in the Fifth Circuit, the ICJ issued its decision in *Avena*. *Id.* at 86a-186a.

In *Avena*, ICJ determined that the United States had violated Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 101, 596 U.N.T.S. at 292, by not informing 51 Mexican nationals, including petitioner, of their Vienna Convention rights, and by not notifying consular authorities of the detention of 49 Mexican nationals, including petitioner. Pet. App. 183a, para. 153(4) and (5). The ICJ determined that the appropriate remedy for those violations "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals." *Id.* at 185a, para. 153(9). The ICJ indicated that review and reconsideration should occur through a judicial process, *id.* at 174a, paras. 140-141, that the relevant inquiry was whether a violation caused actual prejudice to the defendant, *id.* at 165a, para. 121, and that procedural default rules could not bar that review. *Id.* at 160a-161a, para. 113.

The Fifth Circuit denied petitioner's application for a certificate of appealability. *Medellin* v. *Dretke*, 371 F.3d 270 (2004), cert dismissed, 544 U.S. 660 (2005). It held

that petitioner had procedurally defaulted his Vienna Convention claim and that the Vienna Convention does not confer an individually enforceable right. *Id.* at 280. This Court granted review. See *Medellin* v. *Dretke*, 543 U.S. 1032 (2004).

Before the Court heard argument in *Medellin*, three significant events occurred. First, on February 28, 2005, the President issued a determination that "the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico* v. *United States of America)* (*Avena*), 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Pet. App. 187a. Second, on March 7, 2005, the United States gave notice of its withdrawal from the Optional Protocol. See *Sanchez-Llamas* 126 S. Ct. at 2675. Third, relying on the President's determination and the *Avena* decision, petitioner filed an application in the Texas Court of Criminal Appeals for state habeas corpus review. Pet. App. 4a-5a.

After argument, this Court dismissed the petition for a writ of certiorari in *Medellin* as improvidently granted. *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam). The Court explained that it had taken that action because the recently initiated state proceeding might provide petitioner with the review and reconsideration he sought, and because threshold procedural issues could independently bar federal habeas review. *Id.* at 664.

4. The Texas Court of Criminal Appeals subsequently dismissed petitioner's application for state habeas corpus relief. Pet. App. 1a-79a. The court held that the *Avena* decision and the President's determination "do

not constitute binding federal law" and therefore do not preempt the State's prohibition against the filing of successive applications for state habeas corpus relief. *Id.* at 64a.

The court rejected petitioner's reliance on the *Avena* decision as a source of binding law based on this Court's decision in *Sanchez-Llamas*. Pet. App. 20a-24a. Noting this Court's statement that determining the meaning of treaties that are given effect as federal law is the "province and duty of the judicial department," 126 S. Ct. at 2684 (internal quotation marks omitted), the court interpreted *Sanchez-Llamas* to hold that "ICJ decisions are not binding on United States courts." Pet. App. 24a.

With respect to the President's determination, a four-judge plurality of the court ruled that the President "has exceeded his constitutional authority by intruding into the independent powers of the judiciary" to determine "what law to apply" and "how to interpret the applicable law." Pet. App. 30a. Referring to the framework for review of Presidential action proposed by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635-638 (1952), the plurality first examined whether the President's action was supported by his "inherent foreign affairs power." Pet. App. 30a. The plurality concluded that the President's action could not be upheld under cases recognizing the President's foreign-affairs authority to resolve an international dispute through an executive agreement, because the President's action in this case constituted a "unilateral act." *Id.* at 43a.

The plurality next rejected the United States' argument that the United States' ratification of the U.N. Charter and Congress's enactment of federal statutes pertaining to the United Nations implicitly give the

President authority to determine how to respond to an ICJ decision. Pet. App. 53a-55a. The plurality reasoned that "[t]he President is still bound by the Constitution when deciding how the United States will respond to an ICJ decision," and that, for the reasons already given, "the President exceeded his implied foreign affairs power by directing state courts to give effect to *Avena*." *Id.* at 55a.

Presiding Judge Keller filed a concurring opinion. Pet. App. 64a-71a. She concluded that the President's determination violated principles of federalism because, in her view, no treaty authorized the President's determination, and its validity therefore turned on a balance of strength of federal and state interests. Here, she believed, the national interest served by the President's determination is "attenuated," while the State's interest in criminal justice is "fundamental." *Id.* at 69a.

Judge Cochran also filed a concurring opinion. Pet. App. 76a-79a. She concluded that, because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. *Id.* at 78a-79a.

ARGUMENT

I. REVIEW IS WARRANTED ON THE QUESTION WHETHER THE PRESIDENT VALIDLY DETERMINED TO HAVE STATE COURTS GIVE EFFECT TO *AVENA*

The decision of the ICJ in *Avena* imposed an international law obligation on the United States to accord review and reconsideration through a judicial process in the cases of the individual defendants addressed in that decision. Although the President does not agree with the ICJ's interpretations of the Vienna Convention, the

President recognized that the United States had, pursuant to the Optional Protocol, agreed to resolution of the dispute by the ICJ, and that it is answerable under the U.N. Charter for any failure to comply. To discharge its international obligations under *Avena*–and thereby to protect the interests of United States citizens abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment in the international community to the rule of law–the President determined to have state courts provide review and reconsideration under *Avena* of the convictions and sentences imposed, while also withdrawing from the Optional Protocol. See *Sanchez-Llamas* v. *Oregon*, 126 S. Ct. 2669, 2685 (2006). The decision of the Texas Court of Criminal Appeals to invalidate the President's action frustrates the Executive's determinations in this sensitive area, and thwarts the intent of the Optional Protocol and U.N. Charter to confer upon the President adequate authority and responsibility to carry out the Nation's treaty obligations. That decision warrants this Court's review.

A. Because The Decision Below Invalidated An Action Of The President On A Matter Of International Importance, Review By This Court Is Warranted

The Texas Court of Criminal Appeals expressly held that the President exceeded his authority in having state courts give effect to the *Avena* decision. A majority of the court concluded that the President lacked authority under the treaties, statutes, and Constitution of the United States to ensure that the United States complies with the *Avena* decision. A state court decision invalidating such an action of the President and effectively

frustrating efforts to comply with international treaty obligations clearly warrants this Court's review.

The President's determination that state courts give effect to the *Avena* decision was intended to discharge the United States' international law obligation to comply with that decision and reflects the President's considered judgment that the United States' foreign policy interests in meeting its international obligations and protecting Americans abroad require the United States to comply with the ICJ's decision. In setting aside the President's determination, the Texas Court of Criminal Appeals has not only decided fundamental questions of federal law relating to the authority of the President to bring the United States into compliance with its treaty obligations. It has also set a course that, if not reversed, will place the United States in breach of its international law obligation to comply with the *Avena* decision, leave unresolved the dispute between Mexico and the United States over the treatment of petitioner, and frustrate the President's judgment that foreign policy interests are best served by giving effect to that decision. The importance of the question of the Presidential authority resolved by the Texas Court of Criminal Appeals, and the foreign policy ramifications of that decision, make the need for this Court's review manifest.

In *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), even before the President issued his determination, this Court granted review on the question whether the *Avena* decision should be given effect in the domestic courts of this country. The Court dismissed the petition for a writ of certiorari as improvidently granted only because the Texas courts might provide the relief that petitioner sought and because there were potential procedural barriers to consideration of the effect of the

President's determination and the *Avena* decision on federal habeas corpus review. *Id.* at 663-664. In dismissing the petition for a writ of certiorari, the Court anticipated the possibility of review following the state courts' disposition of petitioner's state habeas petition. *Id.* at 664 n.1. Similarly, in a concurring opinion, Justice Ginsburg, joined by Justice Scalia, noted that "[t]he Texas courts are now positioned immediately to adjudicate these cleanly presented issues in the first instance," and "[i]n turn, it will be this Court's responsibility, at the proper time and if need be, to provide the ultimate answers." *Id.* at 672 (Ginsburg, J., joined by Scalia, J.).

The Texas Court of Criminal Appeals has now ruled on the question of the President's authority to require state courts to give effect to the *Avena* judgment, and there are no procedural barriers to the consideration of that issue. The Court should grant the petition for a writ of certiorari to resolve that issue.

B. The President Had Authority Under The Treaties, Statutes, And Constitution Of The United States To Require State Courts To Give Effect To The *Avena* Decision

The Texas Criminal Court of Appeals erred in holding that the President lacked authority to ensure the United States' compliance with its international obligation by having state courts give effect to the *Avena* decision. The President's authority to implement the *Avena* decision flows directly from the combination of two treaties–the Optional Protocol and the U.N. Charter–as informed by the President's unique role in foreign affairs, his statutory responsibilities, and his traditional authority in judicial proceedings implicating international law. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the

President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.").

Through ratification of the Optional Protocol, the United States agreed to submit to the ICJ for resolution "[d]isputes arising out of the interpretation or application of the Convention." Optional Protocol, Art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. Through ratification of the U.N. Charter, the United States agreed "to comply with the decision of the International Court of Justice in any case to which it is a party." Art. 94(1), 59 Stat. 1051. And it further agreed that the ICJ's decision would have "binding force * * * between the parties and in respect to that particular case." Article 59 of the ICJ statute, 59 Stat. 1062. The combined effect of those treaty provisions is that the *Avena* decision has "binding force" on the United States, and the United States has an obligation "to comply with the decision" by providing review and reconsideration to 51 individuals.[1]

The authority to decide whether this Nation will comply with an ICJ decision, and, if so, how compliance should be achieved, falls on the President. The Optional Protocol and the U.N. Charter implicitly delegate that authority to the President, consistent with the President's role as the representative of the Nation in foreign affairs and in resolving disputes under those treaties. Several considerations support that conclusion.

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[1] The term "decision" refers to what in United States practice would be called the judgment, and it is only that portion of an ICJ opinion with which the United States must comply. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of an ICJ opinion, and it has not acquiesced in the legal reasoning of *Avena*. See *Sanchez-Llamas*, 126 S. Ct. at 2685.

1. First, the questions whether to comply with an ICJ decision and if so, through what means, raise sensitive foreign policy issues and often call for a prompt response. Because the President is uniquely positioned both to evaluate and resolve sensitive foreign policy issues and to act with dispatch, the Optional Protocol and the U.N. Charter are most sensibly read to entrust the President with the responsibility of deciding how to respond to an ICJ decision.

In this case, for example, the President was best positioned to balance the harm from complying with a decision with which he disagreed against the adverse consequences to the conduct of foreign affairs and to American citizens abroad that would attend defiance of the decision. The President resolved those competing considerations by having state courts give effect to the *Avena* decision with respect to 51 individuals on whose behalf Mexico brought the ICJ case, while withdrawing from the Optional Protocol, so as to foreclose the possibility that the ICJ would apply its erroneous interpretation in future cases that might bind the United States under international law. Because the President was unquestionably in the best position to weigh the strength of those competing considerations, and to balance them in light of global foreign policy concerns, the applicable treaties are logically understood as delegating to the President the authority to strike the appropriate balance for the Nation.

2. In addition, Congress has expressly authorized the President to direct all functions connected with the United States' participation in the United Nations. See 22 U.S.C. 287, 287a. Pursuant to that authority, the President represents the United States in cases before the ICJ. The President also has responsibility to repre-

sent the United States before the Security Council if the United States were to decide not to comply with an ICJ decision, and a party to the decision were to seek to enforce the decision in the Security Council pursuant to Article 94(2), 59 Stat. 1051. A logical and coherent scheme is established when the same person who represents the United States before the ICJ and before the Security Council in the event of an enforcement action for failure to comply with an ICJ decision also has authority to decide how the Nation should respond to an ICJ decision and to carry out the Nation's international obligations if he so determines.

3. Authorities that the President exercises in a number of different international law areas also support interpreting the Optional Protocol and the U.N. Charter to recognize and confer Presidential authority to respond to an ICJ decision and to take actions necessary for the Nation to comply.

a. The task of responding to an ICJ decision has significant parallels to the President's established dispute resolution authority. In a series of cases, the Court has held that the President may settle disputes with foreign nations involving the claims of particular individuals through executive agreements that do not require advise and consent by the Senate or approval by Congress. *American Ins. Assoc.* v. *Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore* v. *Regan*, 453 U.S. 654, 682-683 (1981); *United States* v. *Pink*, 315 U.S. 203, 223 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). For example in *Garmendi*, after the President reached an international agreement to resolve Holocaust-era claims, the Court held that a state law that clearly conflicted with the express federal policy reflected in the President's determination was preempted. Similarly, in

Dames & Moore, the Court upheld a Presidential order suspending claims in American courts in order to effectuate the terms of an executive agreement resolving claims between the United States and Iran. As those and other cases illustrate, executive branch agreements with foreign governments to resolve disputes affecting the claims of specific individuals can validly preempt state law. *Garamendi*, 539 U.S. at 416-417; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 310 U.S. at 327, 331.

In crucial respects, the President exercises a more modest power in responding to an ICJ decision than the power he exercised in the cases cited above. The range of possible international disputes subject to executive settlement is potentially quite extensive, while the responsibility for complying with particular ICJ decisions is constrained by the particular decision and the relatively narrow scope of disputes subject to ICJ jurisdiction. Moreover, in each of the settlement cases, the President decided on the terms of the settlement without approval from the Senate or Congress. In the present context, by contrast, the Senate, by a two-thirds majority, U.S. Const. Art. I, § 3, Cl. 2, gave its advice and consent to both the Optional Protocol and the U.N. Charter, and those treaties, in combination, expressly authorize the ICJ to issue a binding resolution of a dispute arising under the Vienna Convention. Once the ICJ issues such a Senate-authorized resolution of a dispute, only the question of implementation of that resolution remains. In light of the President's established authority to resolve disputes with a foreign government without Senate or congressional approval, the Optional Protocol and the U.N. Charter should be understood to recognize, and to provide the President with, the more modest implementation authority at stake here.

b. The President's implied authority under the Optional Protocol and the U.N Charter to implement an ICJ decision also follows logically from the President's established authority to file suit to enforce a Treaty without express treaty or statutory authorization. *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). If, as *Sanitary District* makes clear, the President has authority to sue a State to enforce the United States' treaty obligation to give effect to the *Avena* decision, the President also has authority to require States to implement the *Avena* decision without the need for coercive and disruptive litigation.

c. The President's claim of authority under the Optional Protocol and the U.N. Charter to implement an ICJ decision also draws strength from other contexts in which the Executive Branch has exercised authority to determine authoritatively whether an international rule of law should be applied in domestic courts. For example, before enactment of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1602 *et seq.*, the Executive Branch determined whether a foreign sovereign should receive immunity from suit, and courts gave effect to Executive Branch determinations. See *Verlinden B.V.* v. *Central Bank of Nig.*, 461 U.S. 480, 486 (1983). Similarly, the Executive Branch authoritatively determines what governments are entitled to sue in our courts. *Pfizer, Inc.* v. *India*, 434 U.S. 308, 319-320 (1978). And the Executive Branch also authoritatively determines whether a treaty remains in force. See *Terlinden* v. *Ames*, 184 U.S. 270, 285 (1902).

4. Practice also supports the President's claim of authority under the Optional Protocol and the U.N. Charter to respond authoritatively to an ICJ decision. During the time that the United States has submitted dis-

putes to the ICJ for resolution, the ICJ has rendered five decisions that have called for implementation by the United States, including *Avena*.[2] In each case, the President, or the Executive Branch acting on Presidential authority, made the decision on how to respond to the ICJ decision. And in each case, Congress acquiesced in the President's response. Cf. *Dames & Moore*, 453 U.S. at 678 (finding relevant a "history of congressional acquiescence" in Presidential authority).

5. Finally, the Presidential determination at issue in this case also falls comfortably within the President's implied authority under the Optional Protocol and the U.N. Charter because it intrudes no more on state authority than is necessary to fulfill the United States' treaty obligation to comply with *Avena*. As *Avena* requires, the President's determination requires review and reconsideration, without regard to procedural default principles, but it did not divest state courts of authority to resolve the underlying claims. Nor did the President require state courts to reach a particular result with respect to those claims. The President instead required only that, for 51 Mexican nationals, the States that failed to comply with the Vienna Convention with respect to those individuals determine whether the State's violation prejudiced the defense. That process respects the State's traditional role in evaluating the merits of the claims of those who seek to overturn their

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[2] See *Case Concerning Rights of Nationals of the United States of America in Morocco* (*Fr.* v. *U.S.*), 1952 I.C.J. 176 (Aug. 27); *Case Concerning Military & Paramilitary Activities In & Against Nicaragua* (*Nicar.* v. *U.S.*), 1986 I.C.J. 14 (June 27); *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Can.* v. *U.S.*), 1984 I.C.J. 246 (Oct. 12); *LaGrand Case* (*F.R.G.* v. *U.S.*), 2001 I.C.J. 466 (June 27).

state law criminal convictions or sentences, while ensuring that the United States discharges its treaty-based international law obligation. Indeed, the result here is less intrusive than the complete displacement of state causes of action through the President's well established authority to settle international disputes.

C. The Reasons Offered By The Court Below For Invalidating The President's Determination Are Unpersuasive

No majority of the court below joined a single opinion invalidating the President's determination. The various opinions, however, offer three principal rationales. None is persuasive.

1. First, the plurality reasoned that the President's action is invalid because it takes the form of unilateral action, rather than an agreement with Mexico. Pet. App. 43a. That rationale ignores the crucial fact that the United States and Mexico had already agreed through the Optional Protocol and the U.N. Charter to resolve their dispute by submitting it to the ICJ for a binding decision. Once the ICJ issued its decision, a second agreement would be superfluous. The President simply had to decide whether to implement a previously agreed-upon resolution.

The plurality's rationale also needlessly hamstrings the President's authority to fulfill the United States' international law obligations. Securing yet another agreement may be a time-consuming process when the President has determined that swift action is required. A government may be unwilling to enter a successive agreement, yet be willing to acquiesce in the President's implementation of a preexisting one. And the precondition imposed by the plurality would effectively give a foreign government a veto power over the President's exercise of authority under treaties of the United States.

2. In a separate opinion, Presiding Judge Keller concluded that the President's determination violated principles of federalism because she viewed the national interest served by the President's determination as weak, and the State's interest in failing to comply with the President's determination as strong. Pet. App. 69a-71a. But where, as here, the President acts pursuant to his authority under treaties of the United States, principles of federalism do not stand as an obstacle. To the contrary, federal law is supreme, and state law must give way. See p. 14, *supra*.

In any event, Judge Keller incorrectly weighed the competing federal and state interests. In characterizing the federal interest as weak, Judge Keller failed to take into account the compelling national interests implicated by the President's determination that promoting the international rule of law and protecting Americans abroad require implementation of *Avena*. And Judge Keller overstated the intrusion on the States' interest of having to determine in 51 cases whether their own violations of a Treaty caused prejudice to the defendant. That interest, while not insubstantial, is far outweighed by the federal interests supporting the President's determination. Moreover, much of the intrusion on state interests is inherent in the Vienna Convention itself. That Convention involves an international obligation of the United States that clearly extends, by virtue of the Supremacy Clause, to state and local laws. The additional intrusion on States that occurs when an international tribunal imposes an obligation on the United States through a decision made binding by the Optional Protocol and the U.N. Charter pales in comparison with the federal interest in treaty compliance.

3. Finally, Judge Cochran concluded that because the President's determination took the form of a memorandum to the Attorney General, rather than a Presidential Proclamation or an Executive Order, it could not create binding federal law. Pet. App. 76a-79a. Nothing in United States Constitution, however, requires a Presidential directive to take any particular form. What is crucial here is that the terms of the President's determination make clear that it was intended to have the legal effect of discharging the United States' obligation by having state courts give effect to the *Avena* decision in the case of 51 identified individuals. *Id.* at 187a. Nothing more was required.

II. WHILE THE *AVENA* DECISION IS NOT PRIVATELY ENFORCEABLE, THE UNITED STATES DOES NOT OPPOSE REVIEW OF THAT QUESTION

Petitioner contends (Pet. 24-26) that the *Avena* decision is privately enforceable because the Optional Protocol and the U.N. Charter obligate the United States to comply with the decision. For the reasons previously discussed, however, the Optional Protocol and the U.N. Charter give the President the authority to decide whether the United States will comply with an ICJ decision, and if so, what measures should be taken to comply. Allowing private enforcement, without the President's authorization, would undermine the President's ability to make those determinations. Cf. *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005). Thus, far from being supported by the Optional Protocol and the U.N. Charter, private enforcement of an ICJ decision conflicts with those treaties. See Brief for the United States as Amicus Curiae in *Medellin* at 33-38 (No. 04-5928).

Moreover, while the Optional Protocol and the U.N. Charter together create an obligation to comply with an ICJ decision, nothing in the text of those treaties suggests that an ICJ decision was intended to be privately enforceable. Cf. *Sanchez-Llamas*, 126 S. Ct. at 2679. To the contrary, the ICJ statute, which is incorporated into the U.N. Charter, makes clear both that an ICJ decision is binding only between the parties to the case, Art. 59, 59 Stat. 1062, and that only nations can be parties. Art. 34, 59 Stat. 1059. Accordingly, in the absence of the President's determination, the ICJ's decision could not be privately enforced in court.

The United States nonetheless does not oppose a grant of certiorari on that question, which the Court had granted review to decide in *Medellin* v. *Dretke*. While the Court has since decided *Sanchez-Llamas*, and that decision cuts against petitioner's position, that case involved the question whether an ICJ *interpretation* should be given effect in this country's courts. Because it did not present the question whether an ICJ *decision* should be given effect, it did not resolve that question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 2007